DIVISION II

ROBERT J. GLADWIN, Judge ARKANSAS COURT OF APPEALS NOT DESIGNATED FOR PUBLICATION

CA06-197

JANUARY 31, 2007

JUANITA CRIST and CLARENCE CRIST APPELLANT

APPEAL FROM THE PULASKI COUNTY COUNTY CIRCUIT COURT [NO. CV 2004-6005-17]

HON. MACKIE M. PIERCE, JUDGE

V.

AFFIRMED

DAVID P. DEAN, M.D.

APPELLEE

This is a medical-malpractice case. Appellants Juanita and Clarence Crist appeal from the trial court's order granting summary judgment in favor of appellee, Dr. David Dean.¹ On appeal, Crist argues that the trial court erred in granting summary judgment to Dr. Dean and in allowing Dr. Dean to orally adopt the motion for partial summary judgment filed by St. Vincent Infirmary Medical Center (St. Vincent). We affirm.

On June 2, 2002, Crist was admitted to St. Vincent to undergo heart by-pass surgery to be performed by Dr. Dean. After the surgery, it was determined that Crist had contracted Methicillin Resistant Staphylococcus Aureus (MRSA), an infection.

¹Due to the derivative nature of Clarence Crist's claim, we will refer to Juanita Crist alone unless the context requires otherwise.

On June 2, 2004, Crist filed a complaint against Dr. Dean, St. Vincent, and various other individual defendants, alleging medical negligence, breach of contract, and breach of informed consent.² She also claimed that the doctrine of res ipsa loquitur applied on the basis that the infection was the result of a breach in sterile technique in the operating room and would not have happened had there not been a breach of the sterile technique. Crist sought compensatory and punitive damages.

On November 14, 2005, Dr. Dean filed a motion for summary judgment in which he asserted that Crist's medical expert failed to provide testimony that would allow Crist to meet her burden of proof. Specifically, the motion alleged that there was no proof of any act or omission by Dr. Dean that breached the standard of care and that the res ipsa loquitur claim was inapplicable. Attached to the motion and supporting brief were excerpts of depositions.

Dr. John Dietrich, who treated Crist for the MRSA infection, testified that he did not recall any discussions with the treating physicians about how Crist was infected with MRSA, adding that sometimes it is important to know. He said that a source of the MRSA infection was found in the right limb of the graft but that there was no way to determine how the graft became infected. He said that he did not recall any specific conversations with Dr. Dean about the surgical procedure or identifying any problems during surgery. He also did not recall being told that there was a break in sterile technique during surgery.

Dr. Dietrich said he had no knowledge whether it was ever determined whether Crist was a carrier of MRSA but that it is possible for a person to be a carrier of MRSA without being

²St. Vincent and the other defendants were eventually dismissed from this action.

infected by it. According to Dr. Dietrich, an MRSA infection is usually caused by contact and that it is rarely put into the air. He testified that one of the ways MRSA is introduced into hospitals is by patients or visitors who are carriers bringing it into the hospital. He testified that even medical providers could be carriers of MRSA without knowing it. Dr. Dietrich testified that it was possible that the graft that was placed in Crist's body was infected when it was packaged and that, because the germ is not visible to the human eye, one would not be able to see it while opening the package.

Dr. Dietrich testified that, even with appropriate policies and procedures for preventing the spread of infection, hospitals are not able to permanently eradicate the MRSA germ or keep it controlled. He opined that MRSA infections can occur from a breach in sterile technique but that it was also possible for such infections to occur even when all the proper techniques for sterility and cleanliness have been used.

Dr. Dietrich testified that he did not know how Crist became infected and that the infection could have been in her blood and gone to the graft or it could have been in her lungs and infected the bloodstream. Dr. Dietrich testified that the data suggested that Crist became ill with pulmonary symptoms on June 10, 2002, following surgery on June 4, and one of the early cultures that did grow staph was from a specimen from her lungs. He said that Dr. Dean never told him that Dr. Dean was aware of a break in technique during his surgery on Crist.

Dr. Dean testified that having an infected graft was an unusual event. He said that, prior to the surgery, he advised Crist that certain risks were attendant to any surgery, including, but not limited to, the risk of contracting an infection. He said that, as the surgeon in charge, he was

responsible for ensuring maintenance of a sterile field in the operating room. Dr. Dean stated that there was no breach or break of sterile conditions in the operating room during Crist's surgery; that he did not observe any problem whatsoever that related to the maintenance of sterile conditions during the surgery; that nothing that was in any way inappropriate happened during the surgery; and that he knew of nothing that happened in the operating room during the surgery that violated any of St. Vincent's rules relating to operating room sterility.

Dr. Dean further testified during his deposition that, subsequent to the surgery, he explained to Dr. Larry Duberstein, Crist's brother-in-law, that there were many possible sources of the bacteria that caused the infection, including Crist's lungs, her blood or skin, drugs, or a breach of the sterile field. Dr. Dean said that he did not tell Dr. Duberstein that there had been a break in technique; rather, he was listing possible sources of the infection for the other physician.

In her response to Dr. Dean's summary-judgment motion, Crist asserted that evidence existed to show that Dr. Dean breached the applicable standard of care by allowing a break in sterile technique to occur during surgery. She also asserted that the MRSA infection was proximately caused by the break in sterile technique and that Dr. Dean was the only party who would know whether there was a break in technique.

In support of her response, Crist attached the affidavit of Dr. Ernest Kleier in which Dr. Kleier testified that he was familiar with the standard of care and that both the physicians treating Crist and St. Vincent breached that standard of care by allowing Crist to be operated on and treated in an unsterilized environment. Dr. Kleier also opined that MRSA is preventable

when hospitals and physicians follow proper protocols such as thoroughly sterilizing the equipment used to treat patients, thoroughly washing and sterilizing the hands of the medical personnel coming in contact with the patient, and wearing sterile gloves and clothing when coming in contact with the patient or equipment. He also stated that, following surgery, Crist's wound was left open for several days; that some of St. Vincent's personnel did not wear sterile gloves or wash their hands when treating Crist; and that this could have lead to Crist's infection.

In his deposition, Dr. Kleier testified that it is unknown, and would be difficult to prove, who transmitted the infection to Crist. He said that it was conceivable that Crist could have contracted the infection after she left the operating room and that Dr. Dean would not be responsible if other personnel were not using proper sterile technique in their care of Crist after she left the operating room. Dr. Kleier also said that an MRSA infection can be contracted during surgery without a breach of the standard of care or a break in sterile technique.

He agreed that Crist could not be ruled out as a carrier of MRSA. According to Dr. Kleier's testimony, it is common that surgeons rely on others to sterilize the equipment and clothing used during surgery, to sterilize and prepare the area to be operated on, and to sterilize a graft or other material implanted in a patient during surgery. Dr. Kleier opined that, if someone other than Dr. Dean actually transmitted the MRSA to Crist, it would be unfair to blame Dr. Dean. He stated that, although he believed that Crist acquired the infection during her hospital stay from the June 4 surgery through mid July 2002, he could not identify the physician or physicians who deviated below the standard of care. He could not identify any specific facts

showing that Dr. Dean deviated from the standard of care. He also could not identify anything in Crist's medical records to show where a break in sterile technique occurred.

He said that, during the course of surgery, Dr. Dean would properly be focused on the technical requirements of the surgery and, therefore, not observe some of the things occurring around him in the operating room. He said that Dr. Dean, as the surgeon, would have the most contact with the infected site. Dr. Kleier did not believe that Dr. Dean was trying to cover up anything concerning Crist's infection. He said that it was reasonable for a surgeon not knowing the source of an infection to list a break in technique as a possible source but added that specifying a breakdown in the operating room could indicate some prior knowledge of the source. Dr. Kleier did not consider Dr. Dean's statement that there was a break in technique, as recounted by Dr. Duberstein, to be an admission that Dr. Dean himself broke sterile technique. He also said that Dr. Duberstein, as a physician and surgeon, would have sufficient training and expertise to understand the import of Dr. Dean's statement and to follow up by asking what Dr. Dean meant. He said that the possibility that Crist acquired the MRSA after surgery would not be consistent with Dr. Dean's statement that the infection was the result of a breakdown in the operating room.

Finally, Dr. Kleier opined that, if a break in sterile technique occurred in the operating room, it would be below the standard of care for a hospital like St. Vincent. He also opined that, if Dr. Dean himself was the cause of the break in sterile technique, it would fall below the standard of care.

Crist's sister, Shirley Duberstein, testified that she is married to Dr. Duberstein; that her husband asked to review Crist's file and asked Dr. Dean what happened; and that Dr. Dean replied that there was a break in sterile technique. She said that her husband did not ask any follow-up questions of Dr. Dean but that she later asked Dr. Dean how could there have been a break in technique. She said that Dr. Dean told her that there could have been a hole in someone's glove; that there could have been an unsterilized instrument; or that the bacteria could have been on her sister's skin prior to the surgery. She said that Dr. Dean did not identify a single, particular cause of the infection.

Dr. Duberstein testified that he asked Dr. Dean what caused Crist's infection and that Dr. Dean replied, definitively, that there had been a break in technique. Dr. Duberstein said that he did not ask any follow-up questions. He also did not recall Dr. Dean's giving a list of possible causes. He also could not answer the question of whether Dr. Dean prefaced his response regarding a break in technique with the phrase "that it was possibly" or "could be." He also did not know what Dr. Dean meant by his response. He said that he had read Dr. Dean's deposition and that he and Dr. Dean recall the conversation differently. Dr. Duberstein said that he did not interpret Dr. Dean's statement as indicating that he (Dean) did anything wrong. He said that it would be pure speculation on his part to know what Dr. Dean meant by his statement or whether the break was within Dr. Dean's control.

In her deposition, Juanita Crist testified that there was not much discussion of the risks of the procedure she was to undergo by any of the doctors and that the risks that were discussed related to the dangers of anesthesia. She could not recall any conversation with Dr. Dean or the

nurses prior to being placed on the respirator. After she was removed from the respirator, she asked Dr. Dean how she became so ill and Dr. Dean told her, "Juanita, there is a breakdown in the [operating room]." She said that Dr. Dean did not elaborate on the statement, nor did she recall Dr. Dean's making any other statement. Clarence Crist's testimony was consistent with his wife's.

Crist's daughter, Toni Boydston, testified that she did not hear Dr. Dean make a statement that there was a break in technique in the operating room. She said that Dr. Dean did tell her mother that "there was probably a breakdown in the [operating room]" but that he did not identify the individual responsible for the breakdown. She also said that she and Dr. Dean never discussed whether the statement was an admission that he did something wrong in the operating room.

At the hearing on the motion, after Crist stated that Dr. Dean had not filed the motion as to the contract claim, Dr. Dean orally moved the court to allow him to adopt St. Vincent's motion for summary judgment as to the res ipsa and breach-of-contract claims. Crist objected. In its brief in support of its motion for summary judgment, St. Vincent had argued that Crist had failed to state a cause of action for breach of contract because the Medical Malpractice Act rolled all causes of action, whether based in tort, contract, or otherwise, into one cause of action for "medical injury." *See* Ark. Code Ann. §§ 16-114-201(1), (3). In response, Crist argued that she had stated a cause of action for breach of contract apart from the Medical Malpractice Act and asserted that Dr. Dean expressly assured Crist that he would take all appropriate precautions to assure sterile conditions during the surgery.

On December 22, 2005, the trial court issued a letter opinion granting Dr. Dean's motion for summary judgment on both the negligence and res ipsa loquitur theories. The court also noted Crist's objection to allowing Dr. Dean to orally adopt St. Vincent's motion for summary judgment on the breach-of-contract claim. However, the court could not find any prejudice to Crist due to the fact that she had responded to St. Vincent's motion. Ultimately, the court granted Dr. Dean summary judgment as to that count as well. An order memorializing the trial court's rulings was entered on December 27, 2005. Crist timely filed her notice of appeal.

Summary judgment is appropriate only when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court reviews the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents. *Id.*

In her first point, Crist argues that she established a cause of action for negligence against Dr. Dean and that he breached the standard of care. Arkansas Code Annotated section 16-114-206(a) (Repl. 2006) specifies that the plaintiff in an action for medical injury shall have the burden of proving the following:

- (1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;
- (2) That the medical care provider failed to act in accordance with that standard; and
- (3) That as the proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.

Here, Crist's expert, Dr. Kleier's statements in his affidavit were directed to St. Vincent personnel. In his deposition, Dr. Kleier could not identify any act or omission by Dr. Dean that violated the standard of care. Dr. Kleier opined that, *if* a break in sterile technique occurred, it would be a breach of the standard of care. He also opined that, *if* Dr. Dean were the cause of the break in technique, it would also be a deviation from the standard of care. These statements are speculating that Dr. Dean was the cause of the infection. Dr. Kleier could not identify any particular physician who deviated from the standard of care. Thus, Dr. Kleier's testimony is not sufficient to overcome Dr. Dean's summary-judgment motion. *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, ____ S.W.3d ____ (2006); *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999).

The mere fact of infection in a hospital is not enough to open the door to awarding of damages. *See Bartlett v. Argonaut Ins. Cos.*, 258 Ark. 221, 523 S.W.2d 385 (1975). Crist cannot point to anything specific that Dr. Dean did or did not do that caused her infection. All that Crist is left with is Dr. Duberstein's testimony that Dr. Dean told him that there had been a break in

sterile technique during the operation.³ Dr. Dean denied making the statement as described by Dr. Duberstein. However, we believe that Crist is trying to have this single statement bear more weight than it is able. Assuming that Dr. Dean made the statement as indicated, it does not identify who broke sterile technique or how it was broken. In fact, Dr. Duberstein testified to that specific point. As part of her burden of proof, Crist must show by expert testimony that Dr. Dean was the party who breached the standard of care. Ark. Code Ann. § 16-114-206(a). She has not done so.

In her second point, Crist argues that res ipsa loquitur applies in the present case and that the trial court erred in granting summary judgment on that theory. The supreme court has held that the doctrine of res ipsa loquitur may apply in medical malpractice cases if the essential elements for application of the doctrine exist. *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991). The court noted that the theory of res ipsa loquitur may be invoked when: (1) the defendant owes a duty to the plaintiff to use due care; (2) the accident is caused by the thing or instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care; and (4) there is an absence of evidence to the contrary. *Id.* However, the *Schmidt* court concluded that the appellant was not entitled to the application of the doctrine as to two of the doctors where there was "evidence to the contrary," in the form of expert testimony, that indicated the use of "proper care" by two of the defendants. The

³Crist also relies on the opinion of Nurse Janet Blok that Dr. Dean was negligent. However, Blok is not a "medical care provider of the same specialty," as required by section 16-114-206(a). Therefore, we have not considered her testimony.

appellant was able to use the doctrine as against the hospital and its insurer where the same expert testified that the accident could not have occurred without negligence by a member of the surgical team.

Here, there was "evidence to the contrary," in the form of expert testimony that Crist's infection could have come from Crist herself or that the infection could have occurred without a breach of sterile technique. Crist argues that the mere fact that there some evidence to the contrary exists is not sufficient to prevent the application of res ipsa loquitur. However, if there is "evidence to the contrary," Crist has not met her burden of establishing the traditional elements of res ipsa loquitur. The testimony that the infection could have come from Crist herself or that it could occur without a breach of sterile technique means that she did not show that Dr. Dean had exclusive control of the instrument causing the injury or that it would not have occurred without a breach of the standard of care. See Bartlett, supra. This is what the Schmidt court meant in its discussion of Brown v. Dark, 196 Ark. 724, 119 S.W.2d 529 (1938). See also Taylor v. Riddell, 320 Ark. 394, 896 S.W.2d 891 (1995); Eisner v. Fields, 67 Ark. App. 238, 998 S.W.2d 421 (1999). Res ipsa loquitur simply serves as a rule of evidence that merely establishes an inference of negligence, which the fact-finder may or may not believe; it does not result in a basis of recovery. Johnson v. Greenfield, 210 Ark. 985, 198 S.W.2d 403 (1946).

In her third point, Crist argues that she pled a cause of action for breach of contract against Dr. Dean and that the trial court erred in allowing him to adopt St. Vincent's motion for summary judgment as to that claim. The Arkansas Medical Malpractice Act, in Ark. Code Ann. § 16-114-201(1) (Repl. 2006), provides that an "[a]ction for medical injury' means any action

against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury." Section 16-114-201(3) defines "medical injury" as:

any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; . . . or otherwise arising out of or sustained in the course of such services.

Crist relies upon the supreme court's decision in *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996). In *Haase*, the court held that the Medical Malpractice Act did not apply to the plaintiff's contract action because the plaintiff alleged that the doctor made an express warranty guaranteeing the results. However, in the present case, Crist has not pled a cause of action for breach of an express warranty. Instead, in her complaint, she alleges:

[The defendants] are medical professionals and, pursuant to the agreement to conduct [s]urgery, entered into a contract in order to render proper care for the [p]laintiffs under the circumstances, and the [defendants], because of the contract or relationship, owed a duty of responsibility to the [p]laintiffs to provide proper medical treatment and, because of the acts and omissions, recited herein, the [d]efendants have breached the contractual relationship between the [p]laintiffs and, therefore, [p]laintiffs ask for a cause of action against [the defendants] resulting from their breach of contract.

As can be seen, there is no mention of any guarantee or warranty as to the result of the surgery being made and breached by Dr. Dean or any other medical provider. Therefore, Crist has not stated a contract claim as recognized in *Haase*.

We now turn to Crist's contention that Dr. Dean could not orally adopt St. Vincent's motion for summary judgment on the breach-of-contract claim. Citing *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988), Crist argues that Ark. R. Civ. P. 56 does not allow affidavits and documents in support of motions for summary judgment to be supplemented by

oral testimony. However, that is not the same as the present case where Dr. Dean is adopting another party's properly supported motion as his own motion.

Arkansas Rule of Civil Procedure 15 vests broad discretion in trial courts to permit amendments to pleadings. The issue is whether Crist was prejudiced by the amendment because she was not on notice that Dr. Dean was seeking summary judgment on the contract claim. Here, there was no prejudice to Crist. First, as the trial court noted, Crist cannot argue that she was surprised in the sense that she did not have the opportunity to respond to the motion because she filed a response to St. Vincent's motion. Second, at the summary judgment hearing, Dr. Dean argued that Crist's breach-of-contract claim was also precluded. Crist did not object when Dr. Dean first mentioned the contract claim; instead, she only noted that Dr. Dean had not sought summary judgment on the contract claim. This occurred prior to Dr. Dean's oral motion seeking to adopt St. Vincent's motion. Finally, in BWH, Inc. v. Metropolitan Nat'l Bank, 267 Ark. 182, 590 S.W.2d 247 (1980), the supreme court stated that, although it did not approve of the disposition of a motion for summary judgment without notice and hearing, it will not reverse a summary judgment when it is manifest that error is not prejudicial. BWH, Inc., was cited with approval on this point in Rankin v. Farmers Tractor & Equip. Co., 319 Ark. 26, 888 S.W.2d 657 (1994). See also S.E. Dist. Co. v. Miller Brewing Co., __ Ark. __, __ S.W.3d __ (June 15, 2006); Tackett v. McDonald's Corp., 68 Ark. App. 41, 3 S.W.3d 340 (1999). Further, where no cause of action is alleged upon which relief can be granted, we need not consider whether issues of material fact existed. South County, Inc. v. First W. Loan Co., 315 Ark. 722, 871 S.W.2d 325 (1994); Brandt v. St. Vincent Infirmary, 287 Ark. 431, 701 S.W.2d 103 (1985).

As a final matter, we point out that Crist's complaint, as amended, asserted five causes

of action, to wit: negligence against St. Vincent, negligence by Dr. Dean, breach of contract,

res ipsa loquitur, and breach of informed consent. Dr. Dean's motion for summary judgment did

not specifically address the breach-of-informed-consent claim. Neither did the motion filed by

St. Vincent and adopted by Dr. Dean. Neither party discussed the issue at the hearing and the

trial court did not rule on the breach-of-informed-consent count. On appeal, Crist does not argue

that the breach-of-informed-consent count remains viable. We believe that an action for breach

of informed consent is subsumed within the action for medical injury created by the Medical

Malpractice Act. Section 16-114-201(3) defines "medical injury" as:

[A]ny adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; or *from rendition of such services* without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; . . . or otherwise arising out of or sustained in the course of such

services.

(Emphasis added.)

Affirmed.

BIRD and BAKER, JJ., agree.

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